In the Supreme Court of the United States

October Term, 1977

No. 77-1079

ANTHONY MARK LOMBARDI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Anthony Mark Lombardi, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered November 29, 1977, affirming a judgment of the United States District Court for the Western District of Pennsylvania, finding Petitioner in violation of 18 U.S.C. section 1341.

OPINIONS BELOW

There are no official or unofficial reports of the opinions delivered in the courts below. The only opinion below is a memorandum order denying defendant's motions in arrest of judgment and for a new trial rendered by the District Court of the United States for the Western District of Pennsylvania on February 2, 1977 at Criminal No. 76-91 which is in the attached appendix.

JURISDICTION

The judgment order sought to be reviewed is a judgment order of the United States Court of Appeals for the Third Circuit rendered November 29, 1977 at No. 77-1324. An order extending the time to file this petition for a Writ of Certiorari was granted December 27, 1977 extending the time to file the Petition for a Writ of Certiorari to and including January 28, 1978.

There was no petition for a rehearing in the circuit court.

Jurisdiction of this Court is conferred under 28 U.S. Code, section 1254 (1); Act of June 25, 1948, c. 646, 62 Stat. 928.

QUESTIONS INVOLVED

1. Did the trial court err in refusing to grant a new trial because of prejudicial error wherein the government attorney expressed his personal disbelief in the grand jury testimony of appellant?

2. Was appellant denied the effective assistance of counsel at trial for all or any of the following reasons?

a. In failing to object to the admission of testimony on appellant's flight when the proper foundation for the same had not been proved;

b. In failing to object to the admission of hearsay testimony concerning a conversation between a government official and his secretary on the issue of flight.

STATUTES INVOLVED

18 United States Code, section 1341 Act of June 12, 1948, c. 645, 62 Stat. 763, May 24, 1949, c. 139, section 34, 63 Stat. 94, as amended August 12, 1970. Pub. L. 91-375, section 6 (j) (11), 84 Stat. 778.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatsoever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at a place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years or both."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The basis of federal jurisdiction in the first instance was the indictment of petitioner on twenty-one counts of mail fraud in violation of 18 U.S.C. 1341 on April 28, 1976.

STATEMENT OF THE CASE

Appellant was found guilty on thirteen counts of mail fraud at the conclusion of a jury trial on October 20, 1976. Motions for a new trial and for an arrest of judgment were dismissed on February 2, 1977 and sentence was imposed on February 16, 1977 providing for imprisonment for three years and a fine of $3,000.00 with costs and restitution.

The basis for the indictment was a landfill contract between appellant Lombardi and the Borough of Greentree, Allegheny County, Pennsylvania which provided that 35% of the gross receipts received by Lombardi from individuals and business organizations dumping at the site of the fill would be remitted to the Borough monthly together with a monthly statement. The operation of the landfill was conducted from June of 1972 through December of 1973. The prosecution proved that there were in excess of $320,000.00 in receipts and Lombardi accounted to the Borough only for the sum of $81,000.00. Invoices, checks and reports were transmitted through the mail.

Lombardi defended on the basis that he was entitled to deduct from the gross receipts large expenditures incurred as the result of what he contended resulted from material variations from the written landfill agreement. The basis of his contention was an oral agreement between himself and Robert L. Breitenstein who was the Borough Manager at the time which permitted the backcharging of expenses.

Breitenstein denied that there was any such oral agreement modifying the written agreement and to a large

extent the case turned on the credibility of Breitenstein as opposed to the credibility of Lombardi. Breitenstein was dismissed from employment by the Borough for the misappropriation of funds in June of 1973.

At trial the government sought to authenticate a grand jury transcript through the testimony of an Assistant United States Attorney who conducted the grand jury investigation. When asked if Lombardi was uncooperative in any way by the defense attorney, the Assistant United States Attorney replied that he did not believe the story of Lombardi. The remark was objected to and a timely motion for a mistrial was made and denied.

Considerable testimony went into evidence concerning Lombardi's attempt to flee when a government witness was endeavoring to serve a subpoena on him to testify before the grand jury on April 25, 1975, more than one year before indictment. There is nothing in the record to indicate that Lombardi knew or had any reason to know that he was being sought in connection with the commission of any offense. Moreover the same witness was permitted to relate a telephone conversation by radio between himself and his secretary that she placed a phone call to the Lombardi's residence and the person who answered indicated that he was Lombardi. This hearsay statement went into evidence also without the objection of trial counsel. The testimony related to the fact that Lombardi would not come to the door of his residence.

REASONS FOR THE ALLOWANCE OF THE WRIT

The remark of the Assistant United States Attorney indicating his disbelief in the grand jury testimony of Lombardi could not be corrected by the court's instructions to disregard the remark. It must be considered here that the jury heard from the government attorney who conducted the grand jury inquiry and who possibly in their minds could

have had knowledge beyond the evidence on record on which to have based his opinion of disbelief. This conduct is far more prejudicial than the remarks of a government attorney arguing before a jury as such argument is from an advocate of a particular side of a controversy as distinguished from the testimony of a witness, with official trappings, whose knowledge in the case by all appearance was encompassing. The practice of authenticating a transcript through the testimony of a government attorney clothed with officialdom as opposed to calling the court reporter is in itself questionable.

Cases for reversal are *Greenburg v. the United States*, 280 F.2d 472 (1960); *United States v. Freeman*, 514 F.2d 1314 (1973); *United States v. Phillips*, 527 F.2d 1021 (1975); *United States v. McMillan*, 363 F.2d 165 (1967); *United States v. Gradsky*, 373 F.2d 706 (1958).

Lombardi was denied the effective assistance of counsel when trial counsel failed to object and preserve as a ground of error the admission into evidence of circumstances tending to show flight. There must be some foundation to show the person attempting to flee had reason to believe that he would be sought in connection with the commission of the particular offense in question. This matter occurred more than one year before the indictment and Lombardi did not know or have reason to know of involvement to show guilt by fleeing. *Embree v. the United States*, 320 F.2d 666 (CA9-1963); *United States v. O'Connor*, 405 F.2d 632 (CA3-1968). Another example of the ineffective assistance of trial counsel was the failure to object and preserve for the record as error the hearsay statement of the government witnesses' secretary which was offered to prove that Lombardi was in his home at the time the witness was attempting to serve the subpoena and was attempting to evade process.

The test of effective assistance of counsel is that he must exercise the skills and diligence which a reasonably competent attorney would exercise under similar circumstances. He cannot remain silent permitting prejudicial testimony to go into evidence which upon the proper objection is excludable where the same is reversible error. *Pennhill v. Cauthron*, 540 F.2d 938 (CA8-1976).

The law does take into consideration the cumulative effect of compounded errors in trial which would in total affect the deliberations of the jury where the same not only meant that the accused did not have a faultless trial free from error but was denied the essential qualities of a fair trial. *King v. the United States*, 372 F.2d 383 (CA DC-1960). The errors are all the more prejudicial when viewed in light of the fact that the trial in essence was a contest between the credibility of the Borough Manager Breitenstein and Petitioner Lombardi.

Respectfully Submitted,

James R. Fitzgerald,
Attorney for Petitioner
Anthony Mark Lombardi

In the
Supreme Court of the United States

No. A-546

ANTHONY MARK LOMBARDI,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28, 1978.

...../s/ WM. J. BRENNAN, JR.....
Associate Justice of the Supreme Court of the United States

Dated this 27th
day of December, 1977.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 77-1324

UNITED STATES OF AMERICA

vs.

LOMBARDI, ANTHONY MARK
Appellant

(D.C. Crim. No. 76-91)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
November 28, 1977
Before GIBBONS and VAN DUSEN, *Circuit Judges,*
and FISHER,* *District Judge*

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JUDGMENT ORDER

Appellant Lombardi, in this appeal from a sentence following a conviction for mail fraud under 18 U.S.C. 1341, contends:

1. That the trial court erred in refusing to grant a mistrial because of an expression of belief concerning his credibility by an assistant United States Attorney who was called as a witness;
2. That he was denied the effective assistance of counsel when his counsel failed to object to the admission of certain testimony and failed to preserve as a ground for a new trial questions concerning Jencks Act materials.

We find no error in the court's discretionary ruling and no departure by counsel from the standard of normal competency.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,

...../s/ JOHN J. GIBBONS.....
Circuit Judge

Attest

...../s/THOMAS F. QUINN.....
Clerk

Dated: Nov. 29, 1977

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
V.
ANTHONY MARK LOMBARDI
} **Criminal No. 76-91**

MEMORANDUM AND ORDER DENYING THE DEFENDANT'S MOTIONS IN ARREST OF JUDGMENT AND FOR NEW TRIAL

The defendant in this case, Anthony Mark Lombardi, was convicted of thirteen counts of mail fraud at the conclusion of a five-day jury trial on October 20, 1976. Five counts of the original twenty-one count indictment were dismissed by the court and the defendant was found not guilty of the remaining three counts.

The defendant operated a landfill for the Borough of Greentree and his contract provided that he would retain a certain percentage of the gross receipts received at the landfill each month with the remainder to go to the Borough. The evidence at trial disclosed that the defendant misstated the gross receipts thereby underpaying the borough. Each of the thirteen counts on which the defendant was convicted constituted a separate mailing in furtherance of the defendant's scheme and artifice to defraud the Borough of Greentree.

Pending before the court are the defendant's motions in arrest of judgment and for a new trial filed on October 26, 1976. While these motions raise a number of issues, the subsequent brief and oral argument of the defendant is limited to two issues:

(1) The alleged prejudicial remarks of the Assistant United States Attorney, Samuel J. Orr, and

(2) The insufficiency of the evidence to support the verdict.

The defendant's motions will be denied because neither argument constitutes sufficient grounds either to arrest the judgment or to hold a new trial.

Samuel J. Orr, an Assistant United States Attorney, was called as a witness by the prosecutor, Alexander Lindsay, for the purpose of authenticating a transcript of the defendant's grand jury testimony. On redirect examination by Mr. Lindsay, Mr. Orr made the following comment which defense counsel urges upon the court as requiring a new trial:

> "Q. I have one other question-on cross examination you were asked whether he was cooperative and you stated that he was cooperative in that he answered the questions, was he uncooperative in any way?
>
> "A. Mr. Lindsay, quite frankly my recollection was and I don't have the specifics at this point I personally did not believe the story but that is not my job."

The court agrees with defense counsel that this remark was improper and prejudicial. However, two factors lead the court to conclude that the defendant received a fair trial in spite of this comment.

First, the defendant's attorney clearly opened up the door and encouraged Mr. Orr's remark. It is clear from Mr. Lindsay's questions on direct examination that the sole purpose of calling Mr. Orr was to authenticate the grand jury transcript. But careful examination of Mr. Avins' questions on cross examination reveal that he was trying to establish that the defendant was cooperative and helpful with the grand jury.

> "Q. Well, in any event Mr. Lombardi fully and frankly answered your questions and didn't refuse to answer a single question that you put to him?
>
> "A. I don't know whether he frankly answered all the questions, that is something I am not really qualified to

answer. I can testify that he did not refuse to answer any questions to the best of my recollection. As to whether they are frank or not I don't know, only he knew.

"Q. Now, whether he answered frankly is what as lawyers we referred to his demeanor and his cooperativeness, and so on, he was very cooperative, wasn't he?

"A. Cooperative to the extent that he did not refuse to answer any questions.

"Q. There was no hesitation in his answers to these questions that you put to him, was there?

"A. I don't recall exactly how much hesitation there was. I feel uneasy in discussing his credibility because I don't see that much of it, if you want me to go further, I will.

"Q. Now, actually if there had been any hesitation in answering the reporter would have noted it, wouldn't he?

"A. No, I don't believe so, I don't think reporters normally indicate witnesses hesitating and merely because they hesitate doesn't mean they are either lying or telling the truth.

"Q. In any event he answered every question you put to him?

"A. Yes, he did.

"MR. AVINS: All right, that is all."

In the case of *United States v. Sigal*, 216 FS 306 (W. D. Pa. 1963), Judge Marsh denied a motion for new trial based upon prejudicial remarks in the prosecutor's closing argument. Judge Marsh's comment applies with equal force to the facts of this case: "The remarks ... which might be interpreted as prejudicial if taken out of context, were made

in reply to, if not provoked by argument made on behalf of defendants." 216 FS at 309. Much of the prejudicial effect of Mr. Orr's statement is removed when it is placed in the context of Mr. Avins' cross examination.

The second reason that the defendant received a fair trial in spite of Mr. Orr's improper comment is that the court took great pains to correct whatever improper effect this comment had on the jury.

> "THE COURT: No, the remarks should not have been made but the motion to declare a mistrial is denied and the jury is instructed to disregard it. It doesn't make any difference what Mr. Orr believes or doesn't believe about the credibility of anybody, that is your job, your job alone in this case what the credibility of the witnesses is. So you will disregard that remark. All right."

Appellate courts in this circuit as well as in other circuits have consistently held that cautionary instructions may cure the effect of improper comments by counsel. For instance, in *United States v. American Radiator* and *Standard Sanitary Corp.*, 433 F.2d 174 (3d cir 1970), the court held:

> "Appellants' last objection is to some statements made in the prosecutor's closing although they did not move for a mistrial. Certainly the prosecutor did overstep the bounds of propriety in a few instances in the course of his five hour closing, particularly in appearing to personally vouch for the integrity of a government witness and in implying the existence of damaging evidence outside the record. But in our view, the trial court, by the explicit instructions it gave the jury at both the government's and appellants' request, fairly corrected the matter. We do not view the prosecutorial aberrations as being so prejudicial to defendants that they were deprived of a fair trial."

As in American Radiator, most of the cases dealing with improper comments to the jury involved inflammatory

closing arguments by the prosecutor. In most cases, the courts have found that cautionary instructions from the court are sufficient to cure any possible error. In contrast, Mr. Orr spoke in the capacity of a witness and his remarks probably had somewhat less impact on the jury than would comments by the prosecutor himself.

The court has examined all of the cases cited by defense counsel in which new trials were ordered as a result of improper comments to the jury. In all of these cases, the remarks were made by the prosecutor in closing argument and no curative instruction was given by the court. In addition, the remarks were much more inflammatory than those of Mr. Orr. For instance, in *Hall v. United States*, 419 F.2d 582 (5th cir 1969), the prosecutor implied that a witness was guilty of jury tampering, said the government tries to prosecute only the guilty, and called the defendant "a hoodlum".

For all the above reasons, the court is convinced that the defendant received a fair trial in spite of Mr. Orr's improper comment. As our circuit court once said:

> "To say that this remark would have a prejudicial effect on a jury which had listened throughout a long trial to the unfolding of the testimony is to attribute a stupidity and absence of common sense which is incredible in a federal jury." *U.S. v. Barbone*, 283 F.2d 628 (3d cir 1960).

There was ample evidence to support the jury's verdict and therefore the defendant's second argument in support of his motions must also be denied. This evidence included the testimony of a number of officials of the Borough of Greentree, and several secretaries who worked for the defendant. The defendant's story about an alleged oral understanding to deduct certain costs and expenses from his payments to Greentree Borough was not believable in light of the fact that it was not supported by any other witness, was unsubstantiated by any records and was contradicted

by the alleged other party to the agreement, Mr. Robert L. Breitenstein. Finally, the defendant's evasiveness on cross examination completely eroded his credibility.

The court dismissed five counts dealing with dates on which there was no evidence in furtherance of the scheme and artifice to defraud. There was evidence indicating that a mailing was made by the defendant on each of the dates listed in the thirteen counts on which he was convicted. Further, the evidence disclosed that the scheme started before the date of the first count on which the defendant was convicted and continued until the date of the last vount on which the defendant was convicted. The jury thus reached a proper verdict under the facts as disclosed at trial and under the courts instructions about the crime of mail fraud. See Devitt and Blackmar, Federal Jury Practice and Instructions §§40.01-40.18; 18 USC 1341.

The defendant also argues that the verdict reached by the jury as to the various counts is inconsistent. Even if this is true, the jury's verdict need not be overturned by the court.

> "Where different offenses are charged in separate counts of a single indictment, an acquittal on one or more of the counts does not invalidate a verdict of guilty on another even where the same evidence is offered in support of each count ... A rational consistency in the verdicts of a jury on the separate counts of a single indictment is not required." *U.S. v. Vastine*, 363 F.2d 853 (3d cir 1966).

An appropriate order has previously been entered.

/s/WILLIAM W. KNOX,
U.S. District Judge

CC:

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